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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, ET AL., *Petitioners,*

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, ET AL., *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1957

NO. 457

FIRST IOWA HYDRO ELECTRIC COOPERATIVE, F. A. E. GILLMOR, HARRY J. STRONG, and HARRY IMEL,

Petitioners,

vs.

IOWA-ILLINOIS GAS AND ELECTRIC COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA SOUTHERN UTILITIES COMPANY, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 245 F. 2d 613. No petition for rehearing was presented to that Court. The Memorandum of Decision and Order for Judgment of the District Court is set forth in the Appendix.[1]

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1. The Appendix to this brief is cited herein as "R. App." References to the petition for writ of certiorari will be cited as "Petition". References to appellants' Record and Appellees' Supplemental Record below will be cited as "R" and "S. R." respectively.

QUESTIONS PRESENTED

The questions presented by petitioners fail to express the issues in the terms and circumstances of the case. With due respect for the entire record, the questions presented are:

1. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that the appointment of a master was improper when (a) they consented to the appointment of a master to supervise discovery depositions, (b) the Court later enlarged the master's powers to enable him to hear a collateral dispute between plaintiffs and their local counsel, which the master heard at plaintiffs' request, (c) the Court expressly ruled that the master had no authority as to trial of the case, (d) they did not move the Court to vacate the appointment until the day before hearing on dismissal, and (e) the master did not in fact exercise any powers except those relating to the discovery proceedings and the attorney dispute.

2. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that they had been deprived of counsel of their choice, when (a) they deliberately absented themselves from a hearing set by the master at their request on their motion to remove their local counsel, and failed to reopen or seek review of the ensuing default order, (b) they deliberately absented themselves from a subsequent hearing set by the master to rule upon their attempts to act *pro se* in the cause, and failed to reopen or seek review of the ensuing default order, (c) they deliberately absented themselves from final hearing by the Court on all contested issues, and (d) they were at all times

represented by and had available to them other counsel of whom they did not complain.

3. Whether plaintiffs may complain of the action of the District Court in dismissing the case for wilful disobedience of orders and refusals to testify and to prosecute the cause, on the ground that their conduct should be excused as resulting from allegedly erroneous orders, in view of the entire course of plaintiffs' conduct, including their persistent refusal to proceed with discovery, their deliberate disruptions of the deposition for the purpose of avoiding testimony concerning financial transactions, their calculated absence from proceedings set for them by both the District Judge and the master, and their wilful refusals to obey orders of the Court to post security for costs and to testify on deposition, thereby disobeying and collaterally attacking unrevoked and unreversed orders of a Court and master having jurisdiction.

STATEMENT OF THE CASE

The suit below was instituted on February 18, 1954, and nearly two years later, on January 25, 1956, was dismissed by the District Court for plaintiffs' disobedience of judicial orders and failure to prosecute.

This action was brought by five individuals and their wholly-owned corporation, which was organized as an Iowa cooperative, to recover treble damages in the amount of $120,000,000.00 for alleged violations of the antitrust laws which were charged to have prevented plaintiff First Iowa Hydro Electric Cooperative, since 1938 to the date of the complaint, from ever starting to do business (R. 15). The cooperative is the alter ego of the five individual plaintiffs (three of whom are petitioners herein), each of whom claims a one-fifth interest therein, for which he paid a membership fee of two dollars (R. 15; S. R. 2). They proposed to construct a hydroelectric project to be financed entirely

by the public sale of $60,000,000 in 40-year bonds to be secured by contemplated assets of $55,962,000 (S. R. 2).

The cooperative was conceived and organized, and at all times has been directed, by plaintiff Harry J. Strong, its Secretary-Treasurer, General Manager, and Director, who has devoted his full time to its promotion since 1938. It obtained funds from time to time by the solicitation of contributions from interested persons (S. R. 32, 42-4, 77, 79, 135-7, 140). Strong furnished to plaintiffs' attorneys the information on which the complaint was based (S. R. 33).

After the filing of the complaint, which was phrased in general terms (App. 4a), defendant Union Electric Power Company served notice of the taking of plaintiffs' depositions. The District Court stated that, in order to avoid inconvenience to plaintiffs, all defendants desiring to interrogate them should join in the depositions (S. R. 1, 3-4). However, due to plaintiffs' failure to comply with commitments regarding production of documents and witnesses (S. R. 16-7, 20-6; R. 25), no depositions actually commenced until, 15 months later, the District Court expressly ordered Strong to testify on June 6, 1955; and, in implementation of this order, the Court appointed a special master to supervise the depositions, his compensation to be paid by defendants (R. 23). The order provided that the master should have "such other powers as the court may by order later prescribe" (R. 24). The appointment was made with the express consent of all parties (S. R. 31, 32, 58-60, 146), and plaintiffs filed no objections to the order despite notice that any objections should be filed on or before June 2 (R. 24).

At the commencement of Strong's deposition on June 6, appearances for plaintiffs were entered by attorneys James R. McManus of Des Moines, Iowa, James D. France and Xavier C. Nady of Tipton, Iowa, for themselves and

for Allan R. Shepherd of Des Moines, Iowa, and for Haley, Doty & Wollenberg of Washington, D. C.[2] (S. R. 28).

In his deposition Strong persistently disavowed a present recollection of matters under interrogation while giving daily assurances that many facts would ultimately be recalled by him (S. R. 33-50). On June 22, in refusing to limit examination, the master observed (S. R. 49):

> "But even in the deposition itself, the bulk of the time has been used in inquiring of Mr. Strong what facts he had, what facts he knew of, to substantiate things, and so far I don't think any of them are down to anything except, 'Well, there are more' • • •."

On June 21 inquiries were made concerning the finances of the cooperative. Strong admitted that the cooperative had never had a bank account in its own name, that its funds were carried in his own personal bank account, and that he had "no way of knowing" how much of $138,029.59 in contributions reflected in the cooperative's records had gone through his personal account. He was questioned how he accounted for the difference in the amount of money collected and the amount of money spent, and his reply was "I have no answer for it." He stated that he would not produce his "personal" records for the defendants to "hash over" and that "It is none of your business." On June 22 his counsel refused to permit further questioning with respect to cooperative finances (S. R. 41-5), and after hearing the master ordered the production of Strong's personal bank records because of his commingling of funds (S. R. 45-51). A two-week continu-

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2. The Washington law firm of Haley, Doty & Schellenberg appeared of counsel in the complaint. Prior to the deposition Mr. Wollenberg had succeeded Mr. Schellenberg. Plaintiffs never attempted to discharge their Washington counsel; and Mr. Wollenberg, now of Haley, Wollenberg & Kenehan, represented petitioners in the Court of Appeals and now brings this petition for certiorari on their behalf.

ance was then ordered by the master at plaintiffs' suggestion (S. R. 51).

Upon reconvening plaintiffs initiated an attack, which they have not defended on appeal, upon the probity of the master, accusing him of "partisan interest" as allegedly demonstrated by his production order, and obtained another continuance of the deposition in order to file an application with the Court for his removal (S. R. 53). After hearing, the Court denied the motion, ordered the resumption of the deposition and observed (S. R. 56, 59):

> "It is significant that no objection was raised to the qualification of the master until the adverse rulings came on the matters affecting the bank account of Mr. Strong."

Strong never again resumed the witness stand. On July 12 his deposition stood uncompleted by Union, and none of the other defendants ever had an opportunity to examine him. In the intervening six months prior to the dismissal, plaintiffs or their counsel obtained six continuances (S. R. 55, 60-2, 68-9, 71-2, 73, 114), raised diversionary matters not involving defendants, including attacks on the Court, both masters, and their local counsel (R. 78, 32, 41; S. R. 53-61), and attempted two interlocutory appeals to the Court of Appeals (R. 77; S. R. 113). Finally, they wilfully refused to comply with Court orders to deposit security for costs (R. App. 11a; App. 29a), and plaintiffs Strong and Gillmor wilfully refused to testify on three separate occasions (S. R. 91, 120, 130).

On July 13 Strong and attorney McManus engaged in a fist-fight in a hotel room (R. 58, 35, 44), but they were subsequently reconciled (S. R. 78, 81-2), and in Strong's undissenting presence McManus presented plaintiffs' attack on the master to the District Court on July 21 (S. R. 56).

By their own admission plaintiffs did not "lose faith" in their local attorneys before August, 1955 (S. R. 100), after a trip Strong made to Chicago to raise litigation monies.

The dispute between plaintiffs and their local counsel grew out of a controversy over the disposition of these monies. On July 25 Strong went to Chicago with Jake More, general counsel for the cooperative, where they met one Joseph P. Condon, one Seth Gooder and one Lloyd Drexler. Strong told them that he was very pleased with his lawyers, who were doing a good job, and that he wanted to raise a $25,000 fund to finance the continuation of the litigation (S. R. 77-82).

Drexler and Condon each delivered checks for $5,000 to Jake More to be held by him until the balance of the fund had been raised, and Gooder agreed to send Strong $5,000 at such time. It was stipulated that the fund was to be used solely for litigation expense, that none of it was to be used for Strong's personal living requirements, and that Strong was to pay $10,000 from the fund to plaintiffs' local counsel for attorneys' fees and expenses (S. R. 78, 81).

On July 31 Strong represented to Jake More that he had raised more than enough to complete the $25,000, and More forwarded the Drexler and Condon checks to him. Gooder likewise sent Strong his promised $5,000 (S. R. 80-1). Strong later admitted to attorney Nady that he had lied and that he had not raised the balance of the $25,000 (S. R. 83).

Instead of paying his attorneys as he had promised, Strong procured Rock Island, Illinois lawyers to file their appearance as "associate attorneys" for plaintiffs, to which plaintiffs' local counsel responded with a motion to quash (R. 28). At the ensuing hearing before the District Judge on September 2, the Rock Island attorneys withdrew their appearance, stating they had been "taken in" on the

case (S. R. 66). Strong personally addressed the Court, asserting that plaintiffs had "lost faith" in their local counsel as of September 1 (R. 35; S. R. 64); he accused his attorneys of "stink" and "trickery," alleged that they were discharged, and started to walk out of the courtroom while being addressed by the Court, but was dissuaded by the Judge (S. R. 63-8).

The Court advised plaintiffs that they could employ other counsel in their attorney dispute (S. R. 68) and offered to hear the matter personally either in Des Moines on September 8 or in Davenport during the term commencing September 12 (S. R. 70). At Strong's oral request the Court ordered an indefinite postponement of his deposition to permit plaintiffs to settle the matter of their representation (S. R. 68-9, 71).

Plaintiffs took no action on their attorney dispute until the Court ordered that Strong's deposition be resumed on October 3 (S. R. 71-2). This order was entered September 15, and the next day plaintiffs filed a motion to remove their local attorneys of record. The motion was filed *pro se*, with the sworn statement that it had been impossible for plaintiffs to hire qualified attorneys to represent them in their attorney dispute (R. 41, 42). Subsequently plaintiffs stated under oath that this motion had been prepared upon the advice of an attorney whom they had hired[3] (S. R. 101).

3. Plaintiffs were in fact surrounded by counsel. Mr. Wollenberg's firm and its predecessor have appeared in this case from the time the complaint was filed to the present day (R. 22, 156; S. R. 28). In addition to the anonymous lawyer who counseled them on their motion to discharge their attorneys (S. R. 101), plaintiffs swore on October 17 that they had contacted counsel who were prepared to go to trial on the merits within thirty days (R. 100). Mr. Jake More, a practicing attorney, had represented the cooperative for many years as general counsel until August 31, 1955 (S. R. 85); and plaintiff Imel testified on January 17, 1956, that John Kerwin, a practicing Illinois attorney, had been retained and consulted "in the past few months or so" (S. R. 141). The record contains additional reference to the availability of other counsel (S. R. 121).

The special master having resigned, on September 21 the Court appointed a successor master and, referring to the attorney dispute, enlarged his powers to comprehend those permitted by Rule 53. Plaintiffs and defendants were ordered to deposit $2,500 with the clerk, as security for the master's fees and disbursements, with the specific proviso that defendants should continue to pay the costs of the discovery depositions (R. 48-50, 53). On September 23 Strong wrote the master requesting a prompt hearing of the attorney dispute and a further delay in his deposition (S. R. 103). In response, the master set the dispute for hearing on October 3 (R. 54), gave plaintiffs a third reminder of their right to counsel (S. R. 8; R. 52, 54), and ordered another continuance of Strong's deposition (S. R. 73).

None of the plaintiffs appeared at the hearing on October 3, nor did any attorneys appear for them (R. 70, 72; S. R. 75). That morning Strong telephoned the master from St. Paul, Minnesota to announce that he and Imel were proceeding in the Court of Appeals for an injunction and stay order[4] and that none of the plaintiffs would attend the hearing (S. R. 75). Despite petitioners' inference to the contrary (Petition 8), neither Strong nor any other plaintiff requested a continuance (R. 105, 1-2). Strong's telephone call was the first the master had heard from any plaintiff in the two weeks since Strong had requested a speedy hearing.[5] The whereabouts of the other individual plaintiffs was not explained although all of them had been in Davenport the day before to verify their Eighth Circuit application (S. R. 100).

4. This application, filed without notice, was denied by the Eighth Circuit on the same day (R. 77).

5. This telephone call on the morning of the hearing date is the advance "advice" to the master referred to on page 8 of the petition (S. R. 75).

No explanation has ever been advanced for plaintiffs' failure to appear on October 3 and support their charges by testimony subject to cross-examination. It is noteworthy that on the day judgment of dismissal was entered plaintiffs Mitzner and Naber filed with the Court a "Retraction" which stated in part as follows (S. R. 158):

> "We desire that this court know that all charges made against said counsel by plaintiffs were baseless and without foundation in fact and are now convinced that said misrepresentations were ruthlessly manufactured by a person seeking to serve his own selfish ends and purposes."

The master declared plaintiffs to be in default and heard testimony by the local attorneys and others. The evidence established that plaintiffs' "loss of faith" coincided with Strong's refusal to pay the attorneys the money he had solicited for that purpose, and that prior to this refusal plaintiffs had been unstinting in their praise of their attorneys (S. R. 75-88).

The master ruled on October 5 that plaintiffs had a right to remove their attorneys subject to the payment of reasonable fees, which on the evidence before him he found to be $200,000; but he also held that plaintiffs might reopen the matter to show a lack of means sufficient to pay the fees and apply "for a consequent reduction thereof upon just terms", or that they might seek imposition of an attorneys' lien in lieu of payment (R. 70, 72, 76). Plaintiffs neither explained their default nor attempted to have it set aside, neither applied to the master for a reduction in fees nor for the substitution of an attorneys' lien, and never sought a review of the ruling by the District Court.

Plaintiffs remained silent until the morning of October 10, scheduled for the resumption of Strong's deposition. At

9:35 a.m. that day, Strong filed *pro se* an affidavit of prejudice, charging that District Judge Riley "has a personal bias and prejudice against our project, a hydroelectric development on the Cedar River."[6] (R. 78, 79; S. R. 91). Strong then proceeded to the deposition room where counsel, the commissioner, and the court reporters were assembled before the master, and demanded that all further proceedings be deferred until the questions raised by the affidavit had been determined. The master denied a further postponement and advised Strong to testify, to which he replied, "And I shall decline", and walked out of the room (S. R. 90-1). Thereafter defendants moved for dismissal (R. 82).

On October 17, plaintiffs filed *pro se* over 120 pages of papers, which included a motion to expunge Strong's deposition from the record for alleged inadequacies in the transcript (S. R. 95), to expunge the master's October 5 ruling on the motion to remove their attorneys (R. 86), to expunge the District Judge's order setting the affidavit of prejudice for hearing (S. R. 98), to expunge an order of the master setting defendants' motion to dismiss for hearing (S. R. 96), and a resistance and application for affirmative relief which asked that all orders subsequent to September 2 (the date plaintiffs first claimed a loss of faith in their counsel) be expunged, that their attorneys be discharged,

6. Hearing on it was held by Judge Riley, after notice to plaintiffs personally (S. R. 94), but neither Strong nor any other plaintiff troubled to appear (S. R. 105), nor was the subsequent overruling of the affidavit assigned as error on appeal (S. R. 106).

and that the cause be set for trial in thirty days[7] (R. 89; S. R. 100).

Inasmuch as these papers were filed in defiance of the October 5 default order, the master on October 24 ordered that plaintiffs appear at a hearing on October 28 to show cause why an order should not be entered striking them (S. R. 107; R. 103). Despite personal notice, plaintiffs chose not to appear on October 28, and the documents were ordered stricken (S. R. 107-9; R. 103). Plaintiffs have never advanced an excuse for this default; they neither sought to reopen the matter nor asked the District Court to review the master's order[8]; and they did not assign his ruling as error on the appeal from final judgment (App. 22a).

On November 18, 1955, hearing was had on defendants' motion to dismiss (S. R. 109). The master made extensive findings supporting a dismissal recommendation (R. 108-14), but accorded Strong a further opportunity to testify (R. 113).

A month elapsed, during which plaintiffs did not per-

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7. In note 4 on page 7 petitioners erroneously state that a petition to vacate the appointment of a master was filed on October 17 and is found at R. 86; the cited document obviously refers only to the attorney dispute and not to the master's appointment. The statements in the text at pages 7 and 14 to the effect that a petition to vacate the order of reference is found at R. 89, 93 are also erroneous. The cited document is a twofold motion entitled "Resistance to Defendants' Motion to Dismiss and Application for Affirmative Relief," which requested that the Court expunge eighteen orders issued after September 2, or everything in the record after the plaintiffs "lost confidence" in their counsel; and petitioners now characterize this motion as a petition to vacate the order of reference on the apparent theory that this order was one of the 18 orders and would have been affected by the mass "expunging" proposed by Strong.

8. On November 28 Strong, Gillmor and Naber bypassed the District Court and attempted an interlocutory appeal to the Eighth Circuit from the master's October 28 order. The appeal was subsequently dismissed for want of jurisdiction (S. R. 167). *Gillmor v. Iowa-Illinois Gas & Electric Co.* (1956), 8 Cir., 230 F.2d 947.

sonally contact either the master or the District Court; and on December 20 Strong again refused to testify upon his deposition, declaring "I will chance the dismissal" of the action (S. R. 120).

The master ruled on December 22 that the cause should be dismissed as to Strong and the cooperative because of his refusal to testify (R. 115) and ordered plaintiff Gillmor, president of the cooperative, to commence his deposition on January 10, 1956 (S. R. 122). On that date Gillmor appeared, refused to testify, and while being addressed walked out of the hearing room (S. R. 130). The master ruled on January 16 that the cause should be dismissed as to Gillmor and the cooperative (R. 128).

Plaintiffs' defiance of court-ordered depositions was not the only example of their contempt for lawful authority. The security for costs ordered by the Court on September 21 and again on September 27 was never paid by plaintiffs; no suggestion was ever made to the Court of lack of funds, and no excuse was ever offered to the Court for plaintiffs' failure to make the deposit (R. App. 11a, R. 50, 53, 148). It is undisputed that in August, 1955 Strong, on behalf of all plaintiffs, had received $15,000 from strangers interested in promoting the litigation (S. R. 78-81). Strong later admitted that he had funds with which to make the deposit and that he had in fact purchased a bank draft for $2,500 on September 28 but had declined to deposit it (S. R. 117-8). The bankruptcy proceedings against the cooperative were not commenced until sometime after October 10 (S. R. 112-3), and it was not until November 29 that Strong turned over to the bankruptcy receiver cash

in the sum of $5,081.81[9] (S. R. 118). The record is silent as to what happened to the remainder of the $15,000 acquired by him on August 1. No showing or claim has ever been made that the individual plaintiffs were unable to comply with the deposit orders. In fact, on October 17, plaintiffs undertook to strike a bargain with the District Court, stating under oath that, if the case were set for trial in 30 days and if advised to do so by attorneys in whom they had confidence, they would pay into the registry of the Court their share of the costs (R. 100).

In a petition for review of the master's report, plaintiffs, by their local counsel, on January 3, 1956 for the first time raised the contention before the District Court that the order of September 21, 1955 appointing a successor master was illegal and void and deprived plaintiffs of the right of

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9. On page 12 of the petition it is charged that the cooperative receiver in bankruptcy tendered the $2,500 deposit to the District Judge on October 13, and that such tender was rejected. No record reference is made because this statement is entirely outside the record in this case. It is purportedly derived from a receiver's report in the record in the bankruptcy proceedings, instituted by the Chicago contributors, to which these respondents were not parties. This report, bearing Strong's initials, was filed September 19, 1956, nine months after the cooperative was adjudged not a bankrupt and during the last illness of Judge William F. Riley. Mr. Wollenberg promptly thereafter transmitted to all defense counsel a photostatic copy of the report, certified on the very date it was filed, and proposed to advert to it before the Court of Appeals. The facts are that the petitioning creditors, who were acting adversely to plaintiffs (S. R. 104), handed a check to Mr. Ryan prior to his qualification as receiver, and on the Court's advice the check was returned to Mr. Ryan with the statement that it could be tendered after his qualification. No such tender was ever made. Defense counsel advised Mr. Wollenberg of the misleading nature of the report in this regard and that, in their opinion, any reference to it would be improper. He thereafter took no action under the Rules to incorporate any of these facts in the record in this case, nor did he refer to them in the Court of Appeals.

trial by jury[10] (R. 116). The Court promptly ruled that the order "does not and cannot deprive plaintiffs of their right of trial by jury * * * nor does it empower the Master ultimately to hear and determine the issues between the parties upon the trial of this cause" (S. R. 125). After the Court had set all questions of dismissal for hearing on January 20, plaintiffs for the first time filed on January 19, 1956 a motion to vacate the order of September 21, 1955 appointing a successor master (R. 138; S. R. 125, 142).

All issues were brought on for hearing before the District Court on January 20: the dismissal recommendations of the master, the legality of his appointment, defendants' motions to dismiss, and plaintiffs' failure to deposit security for costs (R. App. 1a-2a). Plaintiffs' local attorneys appeared, as they had at all proceedings since October 3, and contested the dismissal (S. R. 144-50, 89, 105, 107, 109, 116, 126, 133, 137, 159). By order of the Court, all plaintiffs were given personal notice of the hearing (S. R. 125, 142-3, 166), and the Court inquired whether any of the plaintiffs were present in the courtroom (S. R. 144); but they did not appear (R. 151) and thus added boycott to their defaults of October 3 and 28.

On January 25, 1956, the Court filed its Memorandum of Decision and Order for Judgment and ordered the cause dismissed under Rules 37(d) and 41(b) and the inherent power of the Court (R. App. 1a, 16a-17a). Twenty-two days later plaintiffs' Washington counsel filed notice of appeal (R. 155-6).

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10. All prior objections to the appointment of a master had been made to the master, not to the Court (S. R. 75, 108, 109, 116, 127).

REASONS FOR DENYING THE WRIT

I.

The Appointment of a Master Was Not in Conflict with La Buy v. Howes Leather Company, and Did Not Excuse the Refusal of Plaintiffs to Obey Orders of the District Court.

In an effort to elevate this sordid tale of planned and wilful defaults and insolences to the level of a question meriting the attention of this Court, petitioners contend that the appointment of a master in the instant case was in conflict with the decision in *La Buy* v. *Howes Leather Company* (1957), 352 U.S. 249, and that they were accordingly privileged in their defiance of judicial orders.

The *La Buy* decision did not purport to repeal Rule 53 of the Federal Rules, and the factual situation in the instant case is not remotely comparable. A master was first appointed with power to supervise depositions ordered by the Court, and the appointment was made with the express consent of all parties. When plaintiffs embroiled themselves in a dispute with their local counsel, the Court expanded the master's powers to include the right to hear that controversy, and plaintiffs promptly invoked the master's aid in this matter. It was not until after the master had recommended dismissal of the action that plaintiffs moved the Court to vacate the appointment.

The reference of an attorney dispute has been expressly sanctioned by the courts. *In re Badger*, 2 Cir., 9 F. 2d, 560, 562; *In re Weitling*, 266 N.Y. 184, 194 N.E. 401; see *Hyman* v. *Pottberg's Ex'rs.*, 2 Cir., 101 F. 2d 262; *Fisher Studio* v. *Loew's Inc.*, 2 Cir., 232 F. 2d 199, 201, *cert. den.* 352 U.S. 836. All of the other acts of the master involved the progress of pretrial depositions and, like the attorney dispute, were not concerned with trial on the merits. When plaintiffs at length indicated to the Court that they construed the

appointment order as affecting their right to trial by jury, the District Judge promptly issued an order negativing this view. We submit that the Court of Appeals correctly ruled that this limited and special use of a master does not conflict with the *La Buy* decision.

In any event, the legality of the master's appointment is not pertinent to plaintiffs' refusals to testify. Those refusals violated subsisting and unchallenged Court orders and rendered applicable Rules 37 and 41, whether or not a master had ever been appointed.

II.

Having Defaulted on the Numerous Opportunities Given Them by Court and Master to Act in Their Attorney Dispute, Plaintiffs Cannot Unilaterally Refuse to Proceed on the Ground of Lack of Counsel.

Matters relating to the discharge or substitution of attorneys of record in a pending case are subject to the supervision of the court. *Woodbury* v. *Andrew Jergens Co.*, 2 Cir., 69 F. 2d 49; *Doggett* v. *Deauville Corporation*, 5 Cir., 148 F. 2d 881; *John Griffiths & Son Co.* v. *United States*, 7 Cir., 72 F. 2d 466; *In re Badger*, 2 Cir., 9 F. 2d 560; *Curtis* v. *Richards*, 4 Ida. 434, 40 P. 57; *White* v. *Aiken*, 197 Ga. 29, 28 S.E. 2d 263.

In the exercise of this authority, the District Judge gave plaintiffs a choice of dates on which they could bring the attorney dispute before him. They did not avail themselves of this opportunity and took no action until pressed by the order for the resumption of Strong's deposition, whereupon at their request they were granted a speedy hearing by the master and defaulted. Having thus been afforded full opportunity for a judicial examination of their grievances, plaintiffs cannot now complain of the consequences of their own conduct.

When plaintiffs disregarded the master's conditional order by filing a great bulk of *pro se* documents, and the

master gave them notice to appear and show cause why an order should not be entered striking them, plaintiffs again disdained to appear. At no time did they appear before the District Judge, for any purpose, subsequent to his invitation on September 2, 1955; they failed even to appear and explain their conduct at the hearing on dismissal, although personally notified by order of the Court.

It avails plaintiffs nothing, in the face of their defaults, to refuse to obey judicial orders and to testify, on the claim of want of counsel. Even if their claim were true, their status was one they selected and maintained. But in reality the claim was false. Although they posed before the Court as being without counsel of their choice, the record contradicts the pose. They were at all times represented by Mr. Wollenberg and, in addition, consulted anonymous attorneys on the side throughout these proceedings.

The Court of Appeals correctly refused to permit plaintiffs to play cat-and-mouse with the District Court by ignoring its proceedings and later complaining to an upper court that the lower court should have given them more protection in their wilful absence.

III.

Petitioners' Entire Course of Action Fully Warranted the Exercise of the Discretion of the Two Lower Courts.

The entire course of events in this cause shows a planned campaign to make a mockery of the judicial process and a persistent course of interruption and delay. The attack upon the first master, not defended on appeal, at an embarrassing juncture in the deposition; the filing, just before deposition time, of an affidavit of prejudice, the hearing on which they declined to attend; the requesting of a hearing from the master, and, when it was granted, leaving town without prior notice to seek a stay order from the

Court of Appeals; the total ignoring of the numerous hearings, notice of which the Judge and master consistently ordered served personally upon the individual plaintiffs; and, as the culmination of these activities, the refusals to comply with the Court's deposit orders and the final refusals to testify on Court-ordered depositions—all show a studied contempt for the judicial process and a deliberate refusal to progress the cause except on terms dictated by plaintiffs. As both lower Courts found, their conduct was prejudicial to these defendants (R. App. 15a; App. 25a, 29a).

Under circumstances far less contumacious than these the courts have applied the sanctions provided by the rules. *Peitzman v. City of Illmo*, 8 Cir., 141 F. 2d 956, 960, *cert. den.* 323 U.S. 718; *Mooney* v. *Central Motor Lines*, 6 Cir., 222 F. 2d 569; *Collins* v. *Wayland*, 9 Cir., 139 F. 2d 677, *cert. den.* 322 U.S. 744; *Fischer* v. *Dover Steamship Co.*, 2 Cir., 218 F. 2d 682; *Vaughan* v. *First National Bank of Greenville, Miss.*, 5 Cir., 218 F. 2d 804, *cert. den.* 350 U.S. 854; *Carpenter* v. *Carpenter*, App. D.C., 156 F. 2d 857; *Refior* v. *Lansing Drop Forge Co.*, 6 Cir., 124 F. 2d 440, *cert. den.* 316 U.S. 671.

Petitioners' argument to this Court is that their deliberate and wilful defiance of rulings and orders of the Court and master should have been excused because these rulings and orders were erroneous. But it is fundamental to judicial process that parties are not entitled to take the law into their own hands and set at naught judicial orders which they dislike. *Howat* v. *Kansas*, 258 U.S. 181, 190; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450; *Toy Toy* v. *Hopkins*, 212 U.S. 542, 548; *United States* v. *United Mine Workers of America*, 330 U.S. 258, 293; *Johnson* v. *Wilson*, 9 Cir., 118 F. 2d 557, 560; 1 *Freeman on Judgments* (Rev. 5th Ed.) § 394, p. 844.

In a very real sense the choice here is between order and anarchy. As this Court stated in *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450:

> "If a party can make himself a judge of the validity of orders which have been issued, and by his own acts of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery."

CONCLUSION

Upon the record in this cause we submit the petition for writ of certiorari should be denied.

Respectfully submitted,

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